NO. 21137

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENITO MARTINEZ JUVERA and
PATRICK RAMIREZ CEDILLO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On December 29, 1965, a one-count indictment was returned against the appellants, Benito Martinez Juvera and Patrick Ramirez Cedillo, by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2]. 1/

The indictment charged the appellants with the violation of Federal laws relating to unlawful possession of an unregistered firearm (sawed-off shotgun) [C. T. 2].

1/ "C. T." refers to Clerk's Transcript.

Both appellants were convicted by a jury on February 11, 1966 [C. T. 45 and 46].

On April 1, 1966, appellant Cedillo was sentenced to the custody of the Attorney General for five years, subject to parole as provided in Title 18, United States Code, Section 4208(a)(2) [C. T. 55]. The District Court ordered that this sentence run consecutive to the sentence against appellant Cedillo imposed on June 15, 1964, in Criminal Case Number 33601-CRC [C. T. 57].

On April 18, 1966, appellant Juvera was sentenced to the custody of the Attorney General for five years, with opportunity for parole as provided in Title 18, United States Code, Section 4208(a)(2). This sentence was ordered to run consecutive to the sentence against appellant Juvera imposed on July 1, 1964 in Criminal Case Number 33609-CD [C. T. 57-A].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231 and Title 26, United States Code, Section 5851. This Court's jurisdiction is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Section 5851 of Title 26, United States Code, provides in pertinent part as follows:

> "It shall be unlawful for any person . . . to possess any firearm which has not been registered

as required by Section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."

Section 5841 of Title 26, United States Code, provides as follows:

"Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and the place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with."

Section 5848 of Title 26, United States Code, provides in pertinent part as follows:

"For purposes of this chapter - (1) The term 'firearm' means a shotgun having a barrel or barrels of less than 18 inches in length . . . or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches. . . ."

III

STATEMENT OF THE CASE

The appellants were indicted on December 29, 1965, by the Federal Grant Jury for the Southern District of California, Central Division. The one-count indictment charged the appellants with the violation of Federal laws relating to the unlawful possession of an unregistered firearm [C. T. 2].

Trial by jury was held on February 11, 1966, before the Honorable Roger D. Foley, Jr., United States District Judge, at which time both appellants were convicted [C. T. 45 and 46].

Appellant Cedillo was sentenced on April 1, 1966, and appellant Juvera was sentenced on April 18, 1966, as previously indicated in the Jurisdictional Statement.

Appellant Cedillo filed a notice of appeal on April 20, 1966 [C. T. 64]. Appellant Juvera filed a timely notice of appeal on April 19, 1966 [C. T. 59].

IV

QUESTIONS PRESENTED

A. IS SECTION 5851 OF TITLE 26 OF THE UNITED STATES CODE UNCONSTITUTIONAL AND IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

B. WERE THE STATEMENTS MADE BY THE PROSECUTING ATTORNEY IN HIS CLOSING ARGUMENT PREJUDICIAL SUCH AS WOULD JUSTIFY A REVERSAL?

C. WAS THE SHOTGUN, GOVERNMENT EXHIBIT NUMBER ONE, WHICH WAS ADMITTED INTO EVIDENCE, THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE?

D. WAS THERE ERROR IN ADMITTING INTO EVIDENCE THE OBJECTS WHICH WERE DISCOVERED UPON THE SEARCH OF THE VEHICLE?

E. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT CEDILLO HAD EITHER ACTUAL OR CONSTRUCTIVE, JOINT OR SINGLE, POSSESSION OF THE SHOTGUN?

F. DID THE GOVERNMENT PROVE BEYOND A REASONABLE DOUBT THAT THE SHOTGUN IN QUESTION WAS NOT REGISTERED UNDER THE NATIONAL FIREARMS ACT?

G. MUST THE GOVERNMENT PROVE THAT THE FIREARM IN QUESTION HAD A SMOOTH BORE?

H. WAS THERE A VIOLATION OF THE APPELLANT'S

CONSTITUTIONAL RIGHT OF DUE PROCESS WHEN THE CLERK IN IMPANELING THE JURY ANNOUNCED THAT THE INDICTMENT CHARGED A CRIME UNDER SECTION 5841 WHEN THE CRIME IN THE INDICTMENT WAS 5851?

I. CAN A PARTY ASSIGN AS ERROR A PORTION OF THE COURT'S INSTRUCTIONS WHERE NO OBJECTION WAS MADE PRIOR TO THE JURY RETIRING TO CONSIDER ITS VERDICT?

J. DOES APPELLANT CEDILLO HAVE STANDING TO APPEAL HIS CONVICTION?

V

STATEMENT OF FACTS

George LaPold, police officer for the City of Alhambra, in response to a radio call which related specific actions taking place at Crawford's Market, proceeded to the market. As he approached the market, LaPold observed a white Chevrolet facing him in front of the market. LaPold observed defendant Juvera sitting behind the steering wheel of the vehicle wearing a charcoal felt hat and dark glasses [R. T. 24]. 2/ Defendant Cedillo was standing beside the passenger side with the passenger door open, facing the officer with what appeared to be a stocking mask about his forehead [R. T. 25].

2/ "R. T." refers to Reporter's Transcript.

As LaPold entered the market, he saw the Chevrolet pull away and he then followed the vehicle. After observing the Chevrolet proceed on the wrong side of the street, LaPold radioed for assistance and then stopped the Chevrolet. The officer approached the driver's side and requested the driver's license and registration of the driver [R. T. 26]. While the driver was looking for the registration, LaPold observed what appeared to be a sawed-off shotgun laying on the floor under the driver's section [R. T. 27].

At this time Hobart R. Taylor, a police officer for the City of Alhambra, arrived on the scene in response to the radio message which related that LaPold needed assistance. Taylor approached the passenger side of the Chevrolet and asked defendant Cedillo to exit the automobile [R. T. 50]. LaPold asked defendant Juvera to exit the automobile [R. T. 27].

LaPold searched Juvera and found two loaded shotgun shells and a partial dental plate [R. T. 28]. Taylor gave Cedillo a "pat down search" and found a pistol [R. T. 51]. Both defendants were then placed under arrest and informed of their rights [R. T. 30]. A search was then made of the vehicle [R. T. 52].

The shotgun was placed on the top of the vehicle. Another fully loaded shotgun shell was in the chamber [R. T. 31]. The following objects were discovered and admitted into evidence:

A charcoal felt hat that LaPold observed being worn by Juvera at the time the officer stopped the Chevrolet; dark glasses which Juvera was wearing at the time of observation in the market area and which were observed on the seat when the vehicle was

stopped; a black cap which was found under a pillow between the two defendants; black gloves which were found on the seat; white gloves which also were found on the seat [R. T. 33]. A five-shot revolver .38 also was found on the front seat between the two defendants [R. T. 61].

Raymond Dole, Special Investigator for the Alcohol Tax Division of the Treasury Department, examined the shotgun on December 7, 1965, and upon measuring the barrel, found the barrel to be approximately thirteen and one-quarter inches in length [R. T. 63]. The overall measurement of the weapons was approximately twenty-one and one-quarter inches [R. T. 64].

Dole described the weapon as a shotgun which had the handle as well as the barrel cut off [R. T. 64]. Dole had in the past examined several hundred shotguns [R. T. 68].

Government's exhibit number 11, which was a certified copy of a record of the United States Treasury Department, was admitted into evidence. The record stated that no "evidence had been found to show that any person has registered the possession . . ." of the shotgun in question in the instant case and further, " . . . that neither Benito Martinez Juvera or Patrick Ramirez Cedillo, or anyone else, acquired said firearms by transfer" [R. T. 71].

VI

ARGUMENT

A. SECTION 5851 OF TITLE 26 OF THE UNITED STATES CODE, MAKING IT UNLAWFUL TO POSSESS A FIREARM WHICH HAS NOT BEEN REGISTERED AS REQUIRED BY SECTION 5841 OF TITLE 26 OF THE UNITED STATES CODE, IS CONSTITUTIONAL AND NOT VIOLATIVE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

This section (5851), has been held constitutional at least ten times:

Frye v. United States, 315 F. 2d 491 (9th Cir. 1963), cert. denied 375 U. S. 849, 84 S. Ct. 104, 11 L. Ed. 2d 76;

Starks v. United States, 316 F. 2d 45 (9th Cir. 1963);

Castellano v. United States, 350 F. 2d 852 (10th Cir. 1965), cert. denied 383 U. S. 949, 86 S. Ct. 1207, 16 L. Ed. 2d 211;

Taylor v. United States, 333 F. 2d 721 (10th Cir. 1964);

Sipes v. United States, 321 F. 2d 174 (8th Cir. 1963), cert. denied 375 U. S. 913, 84 S. Ct. 208, 11 L. Ed. 2d 150;

Capooth v. United States, 238 F. Supp. 583 (S. D. Tex. 1965);

Hazelwood v. United States, 208 F. Supp. 622 (N.D. Calif. 1962);

United States v. Forgett, 349 F.2d 601 (6th Cir. 1965), cert. denied 383 U.S. 426, 86 S. Ct. 929, 15 L. Ed. 2d 845;

Mares v. United States, 319 F.2d 71 (10th Cir. 1963);

Haynes v. United States, 372 F.2d 651 (5th Cir. 1967).

In the most recent case, Haynes v. United States, supra, it was held "that statute rendering it unlawful for any person to receive or possess any firearms . . . which has not been registered as required by another statute is not unconstitutional even though [the] registration statute has been held unconstitutional, and conviction of unlawful possession of unregistered firearm does not violate [the] constitutional privilege against self-incrimination."

Two recent Ninth Circuit cases, Starks v. United States, supra, and Frye v. United States, supra, both held Section 5851 constitutional since this section concerns the possession of a firearm which no one has registered and not the failure of appellant to register. The statute which required the possessor to register a firearm was held unconstitutional in Russel v. United States, 306 F.2d 402 (9th Cir. 1962), but in the instant case the statute involved deals merely with possession by the appellant of an unregistered firearm and not the appellant's failure to register.

Another case since the Russel case, which found Section 5851 constitutional, is the case of Sipes v. United States, 321 F.2d 174

(8th Cir. 1963), where again the point was made that Section 5851 required only possession by the defendant of an unregistered fire-arm and not the appellant's failure to register same.

B. STATEMENTS MADE BY THE PROSECUTING ATTORNEY TO THE JURY IN HIS CLOSING ARGUMENT DID NOT AMOUNT TO PREJUDICIAL MISCONDUCT WHICH WOULD JUSTIFY A REVERSAL.

Arguments of counsel must be confined to the issues of the case, the applicable law, pertinent evidence, and such legitimate inferences as may properly be drawn therefrom. "When confined to the evidence or reasonable inferences, the arguments of counsel are not to be too narrowly limited." Wakaksan v. United States, 367 F. 2d 639, 646 (8th Cir. 1966).

Counsel is allowed in summation to the jury to present such legitimate inferences as could be drawn from the pertinent evidence adduced in the case. Further, such argument is not to be too narrowly limited. Wagner v. Pennsylvania Railroad Company, 28 F. 2d 392 (3rd Cir. 1960). The extent of a summation by counsel is left to the discretion of the trial judge, Wagner v. Pennsylvania Railroad Co., supra, at 396.

Defendant Cedillo cited three cases which he relies upon in his assertion of prejudicial error regarding the prosecuting attorney's closing argument:

Kemper v. United States, 151 F. 2d 680
(8th Cir. 1945);
Kraft v. United States, 238 F. 2d 794 (8th Cir. 1956);
Hargeth v. United States, 183 F. 2d 859
(5th Cir. 1950).

Those cases are easily distinguished from the instant case since in each of those cases the asserted prejudice was in the admission into evidence of other crimes. In the instant case the statements asserted as prejudicial were not admitted into evidence; on the contrary, the asserted prejudice was in the prosecuting attorney's closing argument which is not evidence at all and is not to be considered by the jury in their decision. The jury was so instructed [R. T. 144].

Reference is also made to the argument in Section D. hereinafter. The prosecuting attorney's argument was properly drawing an inference that because of the fact of an illegal enterprise, the appellants had the intent to possess the firearm without registering it.

C. THE SHOTGUN, GOVERNMENT'S EXHIBIT NO. 1, ADMITTED INTO EVIDENCE WAS NOT THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE.

In a very recent Fifth Circuit case, Nunez v. United States, 370 F. 2d 538 (5th Cir. 1967), where the facts were almost identical with those in the instant case, the court admitted the shotgun into

evidence and held it was not obtained incident to an illegal search and seizure. In Nunez v. United States, supra, appellants, one Hendley and one Schwander, were riding in an automobile when two police detectives observed the automobile being driven recklessly. The officers pursued the vehicle and after it had been stopped, approached the automobile and found appellant lying on the front seat. The appellant was ordered out of the car. The officers then observed a sawed-off shotgun partially beneath the front seat. A search of the appellant disclosed shotgun shells of the same gauge as the weapon. It was held that the search was incident to a lawful arrest (traffic arrest). It was held that there was ample evidence to support the conclusion that the shotgun was clearly visible to the officers without a detailed search of the automobile.

D. THE COURT PROPERLY ADMITTED INTO EVIDENCE THE AUTOMATIC PISTOL, THE CHARCOAL FELT HAT, THE BLACK CAP, THE STOCKING MASK, THE SUNGLASSES, THE BLACK GLOVES, THE WHITE GLOVES AND THE REVOLVER. THESE OBJECTS WERE RELEVANT AND NOT PREJUDICIAL.

An honest and accurate statement of articles found on the premises at the time of the arrest was necessary to present a true word picture of the scene as observed by the persons present. Some courts have admitted evidence as to other articles found at the time of the search as constituting part of the res gestae.

United States v. Volkell, 251 F. 2d 333

(2nd Cir. 1958).

Further, the court in Volkell quoted from United States v. Penn., 115 F. 2d 672 (7th Cir. 1940), wherein it was said, "It was clearly proper to permit the police officer to name all of the articles which were found in the closet for the purpose of disclosing fully the circumstances surrounding the discovery of the gun."

"The facts with respect to the other articles found in the automobile were so interwoven with the facts respecting the firearm as to constitute part of the res gestae. Furthermore, this evidence tended to show that the persons using the garage were engaged in unlawful enterprises and were likely to have acquired the firearm unlawfully and to have failed to register the same." Crapo v. United States, 100 F. 2d 996 (10th Cir. 1939).

In the case of United States v. Gulley, 374 F. 2d 55, at page 58 (6th Cir. 1967), it was stated, " . . . it may be argued that the entire contents of the two sacks thrown out of the automobile were part of the res gestae and their admission was therefore proper because the facts with respect to the evidence sought to be stricken were so interwoven with the facts respecting the admissible narcotics as to be inseparable. Therefore, there was no error in the admission into evidence of the above described objects which were part of the res gestae and also were so interwoven with the facts respecting the admissible shotgun as to be inseparable."

E. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT CEDILLO HAD EITHER ACTUAL OR CONSTRUCTIVE, JOINT OR SINGLE POSSESSION OF THE SHOTGUN.

Possession means dominion and control. Possession can be constructive and does not have to be exclusive. Possession also can be joint. Arellanes v. United States, 302 F. 2d 603 (9th Cir. 1962).

Mere presence or proximity or association with another who is in actual or constructive possession is not sufficient to constitute dominion and control. Arellanes v. United States, supra; Brothers v. United States, 328 F. 2d 151 (9th Cir. 1964); Cipres v. United States, 343 F. 2d 95 (9th Cir. 1965). While presence or proximity or association alone is not sufficient to establish possession, in the instant case there is a great deal more than mere presence. The mask on Cedillo's forehead which later was found in the automobile, the suspicious activity in front of the market, the vehicle proceeding on the wrong side of the street, physical possession of a revolver, etc., take Cedillo out of the realm of mere presence. Therefore, the testimony regarding Cecillo's activities and movements prior to his arrest as well as the objects of the search of the automobile afforded an adequate basis for the jury's determination that the shotgun was in Cedillo's possession, i. e., . . . subject to his dominion and control. Cipres v. United States, supra.

Evidence is admissible against all defendants upon proof that they were engaged in a common enterprise. United States v.

Cohen, 124 F.2d 164 (2nd Cir. 1941), cert. denied 315 U.S. 811.

It appears obvious that the defendants were engaged in a common enterprise.

Evidence of this is the objects which were obtained in the search of the automobile plus the observations of the defendants as testified to by Officer LaPold.

In Johnson v. United States, 270 F.2d 721, at page 724 (9th Cir. 1959), the court quoted Form 55 -- Suggested Forms for Use in Criminal Cases, 20 F.R.D., 231-278:

> "A person who, although not in actual possession, knowingly has the power, at a given time to exercise dominion or control over a thing is then in constructive possession of it."

Two people therefore can have constructive possession over the same object.

In the instant case where the shotgun was under the front seat on the driver's side of the vehicle, either the driver Juvera or Cedillo had the power and could have, at any given time, exercised dominion and control over the shotgun. Therefore, Cedillo did in fact have constructive possession of the shotgun.

F. THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT THE SHOTGUN IN QUESTION WAS NOT REGISTERED UNDER THE NATIONAL FIREARMS ACT.

Government's Exhibit number eleven was admitted into evidence and it stated:

> "This is to certify that I, Thomas H. Kuhn, Mail and Fire Supervisor, Administrative Section, Alcohol and Tobacco Division of the Internal Revenue Service, Washington, D.C., have custody and control of the National Firearms Registration and Transfer Record containing the registration of firearms as required under the National Firearms Act filed in the national office of the Internal Revenue Service, Washington, D.C. I further certify that after diligent search of said record no evidence has been found to show that any person has registered the possession of a Stevens single-barrel shotgun, model 107B, Stevens, 20-guage barrel, length 13-1/4 inches, J. Stevens Arms Company, Chicopee Falls, Mass., without a serial number, and that neither Benito Martinez Juvera or Patrick Ramirez Cedillo or anyone else acquired said firearm by transfer."

[R.T. 71].

Title 26 of the Code of Federal Regulations, Section 179.120 provides in part:

> "Every person in the United States possessing a firearm (a) not registered to him . . . must execute an application for the registration of such firearm on Form 1 (Firearms), in duplicate, with the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D.C., ..."

The statute dictates that the registration of a firearm be in Washington, D. C., with the Director, Alcohol and Tobacco Tax Division of the Internal Revenue Service. Government's exhibit eleven clearly states that there has not been registration of the firearm as is required by statute. The statute makes no reference at all to an individual's residence. Residence has no bearing on the registration. Registration must be in Washington, D. C. In the instant case the firearm was not registered and therefore, Section 5851 of Title 26 of the United States Code was violated.

G. IT IS NOT NECESSARY FOR THE GOVERNMENT TO PROVE THAT THE FIREARM IN QUESTION HAD A SMOOTH BORE.

The words "smooth bore" are taken from the definition of a shotgun in Title 26, Section 5848, of United States Code. However, it is not necessary in the instant case for the Government to prove

each element of this definition since there has been ample expert testimony that the firearm in question was in fact a shotgun.

Officer LaPold testified that the firearm he observed under the front seat in the Chevrolet was a shotgun. Officer Taylor testified that he observed LaPold remove a shotgun from the automobile.

Special Investigator Dole testified that he examined the weapon and that it is a shotgun. Dole testified further that the barrel of the shotgun measured thirteen and one-quarter inches and that the overall length of the shotgun measured twenty-one and one-quarter inches. Dole described the weapon in question as "a shotgun which has had the handle cut off and the barrel cut off". As a special investigator Dole has examined several thousand weapons. Dole also testified that the shotgun was manufactured by the Stevens Arms Company and that in his career he has examined several hundred Stevens shotguns. Therefore, it is apparent that the weapon in question was in fact a shotgun within the meaning of Title 26, Section 5851.

H. THE CHARGE IN THE INDICTMENT WAS NOT BROADENED AFTER TRIAL COMMENCED AND THERE WAS NO VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT OF DUE PROCESS WHEN THE CLERK IN IMPANELING THE JURY ANNOUNCED THAT THE INDICTMENT CHARGED A CRIME UNDER SECTION 5841, WHEN THE CRIME IN THE INDICTMENT WAS SECTION 5851.

Rule 52 of the Federal Rules of Criminal Procedure states, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

In the opening statement by the prosecuting attorney Section 5851 was recited as being the charge in the indictment. All references during the course of the proceedings were to Section 5851. Further, the Judge in his instructions to the jury read the indictment which stated the section involved was 5851.

I. A PARTY CANNOT ASSIGN AS ERROR A PORTION OF THE COURT'S INSTRUCTIONS WHERE NO OBJECTION WAS MADE PRIOR TO THE JURY RETIRING TO CONSIDER ITS VERDICT.

Rule 30 of the Federal Rules of Criminal Procedure states in pertinent part: " . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . ."

There is nothing in the transcript that indicates any

objection was made by appellant Cedillo regarding instructions which were prejudicial to him. Therefore, pursuant to Rule 30, Cedillo cannot cite as error a prejudicial instruction.

J. APPELLANT CEDILLO DOES NOT HAVE STANDING TO PROSECUTE AN APPEAL OF HIS CONVICTION.

Appellant Cedillo was sentenced and judgment against him entered on April 1, 1966. He did not file a notice of appeal until April 20, 1966. Therefore, his notice of appeal was not timely filed, and he thereby lacks standing to prosecute an appeal of his conviction.

Rule 37(a)(2), Federal Rules of Criminal Procedure.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of conviction of appellants Juvera and Cedillo should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James E. Shekoyan

JAMES E. SHEKOYAN